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No. __-__ UNDER SEAL

IN THE
SUPREME COURT OF THE UNITED STATES

ADNAN FARHAN ABDUL LATIF,
Petitioner,

v.

BARACK OBAMA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether requiring the district court to presume the accuracy of intelligence reports denies Guantanamo habeas petitioners the "meaningful opportunity" to contest the lawfulness of their detention guaranteed by *Boumediene v. Bush*, 553 U.S. 723 (2008).

2. Whether a court of appeals' substitution of its own analysis of the record evidence for that of a district court in a habeas case, where there is no finding that the district court committed clear error, improperly intrudes upon the fact-finding function of the district court and exceeds the appellate function of the court of appeals.

3. Whether the court of appeals' manifest unwillingness to allow Guantanamo detainees to prevail in their habeas corpus cases calls for the exercise of this Court's supervisory power.

PARTIES TO THE PROCEEDING

Petitioner in this Court and the appellee in the court below is Adnan Farhan Abdul Latif.

Respondents in this Court and the appellants in the court below are Barack Obama, President of the United States; Leon E. Panetta, Secretary of Defense; David B. Woods, Commander, Joint Task Force, GTMO; and Donnie L. Thomas, Commander, Joint Detention Group, JTF-GTMO.

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OPINIONS BELOW

The classified decision of the court of appeals, *see* Classified Appendix ("App.") 1a, was issued on October 14, 2011. A redacted version of the classified decision is available at 2011 WL 5431524. The district court's classified opinion granting the writ of habeas corpus was issued on July 21, 2010, *see* App. 114a. A redacted version of the classified opinion is available at 2010 WL 3270761.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2011. *See* App. 113a.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Suspension Clause, U.S. Const. art. I, § 9, cl. 2:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2004):

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

STATEMENT OF THE CASE

Petitioner Adnan Farhan Abdul Latif was born in 1976 in Yemen. App. 118a. He sustained head injuries in 1994 as the result of a car accident, and received treatment at a hospital in Jordan. *Id.* He continued to suffer from the effects of those injuries, and spent years seeking treatment. In August 2001, he went to Pakistan and then to Afghanistan, according to him in search of treatment unavailable to him in Yemen. App. 119a. He was seized in Pakistan in December 2001 by Pakistani authorities. He was later transferred to U.S. custody and, in January 2002, was sent to Guantanamo Bay, where he has been detained ever since. *Id.*

1. District Court Proceedings

In 2004, Latif filed a habeas corpus petition in the U.S. District Court for the District of Columbia. There was no progress in the case until this Court rendered its decision in *Boumediene v. Bush*, 553 U.S. 723, 771 (2008), holding that Guantanamo detainees are "entitled to the privilege of habeas corpus to challenge the legality of their detention."

District Judge Henry H. Kennedy held an evidentiary hearing to consider the government's contention that Latif was a member of al Qaeda or Taliban forces and was thus lawfully detained under the Authorization for Use of Military Force ("AUMF"). Judge Kennedy's 28-page decision evaluated the evidence and found that the government had "not demonstrated by a preponderance of the evidence that Latif was part of Al Qaeda or an associated force." App. 141a.

The government's case was "primarily based" on a single document, created [redacted] in late December 2001 [redacted] App. 119a-120a. This [redacted] page "secret" document was heavily redacted, [redacted] The document purports to reflect [redacted] App. 120a. The document provides [redacted] but indicates [redacted]. [redacted] the document [redacted] contains the following statement concerning Latif:

> History: Subject met Ibrahim Al-((‘Alawi)) from Ibb during 2000. ‘Alawai talked about jihad and Afghanistan and convinced subject that he should travel to Afghanistan. Subject did not know if ‘Alawi had actually participated in any jihad activity himself. Subject departed home in early August 2001, travelled by car to San’a, then by airplane to Karachi. He took a taxi to Quetta, then crossed into Qandahar where he went to the grand mosque, where he met ‘Alawi. He went to ‘Alawi’s house, where he remained for three days. ‘Alawi owned a taxi in Qandahar, and had his family with him. ‘Alawi took him to the Taliban, who gave him weapons training and put him on the front line facing the Northern Alliance north of Kabul. He remained there, under the command of Afghan leader ((Abu Fazl)), until Taliban troops retreated and Kabul fell. Subject claimed he saw a lot of people killed during the bombings, but never fired a shot. He went to Jalalabad, then crossed into Pakistan with fleeing Arabs, guided by an Afghan named Taqi ((Allah)). While he was with the Taliban, he encountered ((Abu Hudayfa)) the Kuwaiti, ((Abu Hafs)) the Saudi, and ((Abu Bakr)) from the United Arab Emirates (UAE) or Bahrain.

App. 122a, 145a.

The district court found that the document was "not sufficiently reliable to support a finding by a preponderance of the evidence that Latif was recruited by an Al Qaeda member or trained and fought with the Taliban." App. 138a. The court observed that "there is serious question as to whether the [document] accurately reflects Latif's words" and that "the small portion of the [document] the Court can see contains other factual errors." App. 139a. ("[I]n particular," the document states that Latif had traveled to Jordan, "accompanying . . . a friend injured during the Yemeni civil war . . . for medical treatment of an injury to his hand," but it was undisputed that Latif traveled to Jordan for his own injuries, to his head not his hand, incurred in a car accident, not in a war. App. 118a, 139a, 145a.) The court explained that these errors support an inference that "poor translation, sloppy notetaking, [redacted] or some combination of those factors resulted in an incorrect summary of Latif's words." App. 139a.

The court also found it "significant" that "there is no corroborating evidence for any of the incriminating statements in the [report] as they relate specifically to [Latif]." App. 139a. No other detainee claimed to have seen Latif "at a training camp or in battle," and no other evidence "links Latif to Al Qaeda, the Taliban, a guest house, or a training camp." *Id.* If Latif really had been a Taliban trainee and fighter, many people would have seen him, yet the government offered into evidence no statements from any individuals claiming to have seen Latif in such roles.

The court also found that Latif "presented a plausible alternative story to explain his travel," *i.e.*, that he went to Pakistan/Afghanistan in search of medical care that was unavailable to him in Yemen. App. 139a; *see also* App. 134a-135a. His story was "supported by corroborating evidence provided by medical professionals." App. 140a. The court rejected as "unconvincing" the government's attacks on Latif's credibility, finding that "even if some details of Latif's story have changed over time, for whatever reason, its fundamentals have remained the same."[1] *Id.*

[redacted]

The court granted Latif's petition because the government had not shown by a preponderance of the evidence that Latif's detention was lawful. App. 114a, 141a.

2. Court of Appeals Proceedings

In a 53-page opinion by Judge Brown, the court of appeals vacated the district court's decision and remanded for further proceedings. App. 113a. Judge

[1] In his many interrogations at Guantanamo, Latif consistently stated that he was not Taliban or al Qaeda. An intake form, prepared when Latif was transferred to U.S. custody, [redacted] says that he went to Pakistan "for treatment of ear problem," that he possessed "medical papers" but no weapons when captured, and that he denied any "affiliation" with al Qaeda. App. 163a-164a.

Henderson filed a concurring opinion, arguing that the judgment below should be reversed, with no remand. Judge Tatel filed a 45-page dissent, setting forth his view that the district court's decision should be affirmed.

a. Judge Brown's opinion for the court

Judge Brown wrote that the "[g]overnment's case against Latif is based" on the [redacted] interrogation summary found by the district court to be unreliable. App. 3a.[2] She did not find that any of Judge Kennedy's factual findings concerning this document were clearly erroneous, but held that he committed legal error by refusing to give a "presumption of regularity" to the report, *i.e.*, he failed to presume that the document accurately reflected what Latif said when he was interrogated [redacted] App. 6a, 10a, 11a, 19a-20a. According to Judge Brown, such "a rebuttable presumption of regularity applies to . . . intelligence reports like the one at issue here." App. 20a. The court, however, did not decide whether the burden of overcoming the presumption could be met "by a mere preponderance of the

[2] The court also stated that "all agree" that "[Latif's] detention is lawful" if the summary accurately reflected statements made by Latif. App. 5a. This is incorrect. The district court noted that the report contains information that "would support a conclusion that Latif's detention is lawful"—but did not say that the report, if accurate, would *compel* such a conclusion. App. 139a. It is true that the government had no case if the report were disregarded. However, it was the *only* direct evidence offered by the government to show that Latif was part of an enemy force. There was substantial evidence showing that Latif was not part of an enemy force, including reports reflecting numerous interrogations of Latif. There was also no corroborating witness that Latif was part of an enemy force and, as Judge Tatel noted, "skepticism about the trustworthiness of uncorroborated confessions has deep, historical roots." App. 90a. In petitioner's view, the preponderance of the evidence favors Latif even if the report were to be viewed as an accurate reflection of statements by Latif when he was "interviewed" [redacted].

evidence," or whether some higher standard, such as "clear and convincing evidence," was required. App. 20a n.5.

The court's decision to accord a presumption of accuracy to the raw intelligence [redacted] —was based on several factors, including:

- it was "appropriate to defer to Executive branch expertise" in regard to "wartime records" (App. 12a);
- there should be "judicial modesty when assessing the Executive's authority to detain prisoners during wartime" (App. 13a); and
- [redacted]

The court then conducted a factual "rebuttal analysis" of the document, and concluded that the presumption had not been rebutted. App. 20a-31a. It characterized the mistakes and "inconsistencies" in the document as "minor transcription errors" or "tangential 'clerical errors,'" which it believed did not show the document's "incriminating statements" to be "fundamentally unreliable." App. 25a, 27a.

The court also held that the district court had erred in "fail[ing] to determine Latif's credibility even though the court relied on his declaration to discredit the Government's key evidence." App. 2a. The district court "was obligated to consider

his credibility" because "[o]nly a credible story could overcome the presumption of regularity to which [the [redacted] document] is entitled." App. 31a; *see also* App. 36a (stating that "a determination of credibility" is a "necessary factual finding"). The court also instructed the district court that a detainee's "refusal to testify is relevant to the . . . credibility determination."[3] App. 38a.

Finally, the court held that Judge Kennedy had taken an "unduly atomized approach to the evidence" and had failed to weigh the evidence "collectively." App. 2a, 38a. The court then set forth its own analysis of the evidence. App. 38a-52a. [redacted]

In addition, the court held that the district court erred in failing to give weight to the route traveled by Latif from Yemen—by air from Yemen to Karachi, Pakistan, and then over land to Afghanistan—was one also used "by al-Qaida and Taliban recruits." App. 41a.

The court remanded the case, instructing the district court to "consider the evidence as a whole" and whether "the detainee's self-serving account" outweighs the "presumptively reliable government evidence." App. 53a.

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[3] Latif had not refused to testify. He submitted a declaration. The government could have requested an opportunity to cross-examine him, but it did not do so.

b. Judge Henderson's concurrence

Judge Henderson's 14-page concurring opinion stated her view that, "[w]here the record contains conflicting evidence, then, the clear error standard requires us, as the reviewing court, to assess the comparative weight of the evidence both for and against the district court's finding." App. 56a. Unlike Judge Brown, however, she concluded that Judge Kennedy had "clearly erred in failing to credit" the intelligence document at issue. App. 57a. Her position was that the case should be reversed outright, with no remand.

c. Judge Tatel's dissent

Judge Tatel first explained his conclusion that there was no basis for applying a "presumption of regularity" and accuracy to government intelligence reports. App. 68a-86a.

He distinguished such documents as tax receipts and state court dockets, where such a presumption may be appropriate, from the intelligence document "at issue here [which] was produced in the fog of war by a clandestine method that we know almost nothing about." App. 71a. He noted that the district court judges in Guantanamo habeas cases, who "have developed a uniquely valuable perspective," had consistently rejected the government's request for a presumption of accuracy, allowing only a presumption of authenticity. App. 75a, 80a-81a. The district judges, appropriately in Judge Tatel's view, had "scrupulously assess[ed] the reliability of each piece of evidence," applying established techniques of evidentiary analysis, with no presumption of accuracy. App. 81a.

Judge Tatel added:

> One need imply neither bad faith nor lack of incentive nor ineptitude on the part of government officers to conclude that interrogation [redacted] compiled in the field by [redacted] in a [redacted] near an [redacted] that contain multiple layers of hearsay, depend on translators of unknown quality, and include cautionary disclaimers that [redacted] are prone to significant errors; or, at a minimum, that such reports are insufficiently regular, reliable, transparent, or accessible to warrant an automatic presumption of regularity.

App. 76a-77a.

Judge Tatel explained that he regarded the court's new presumption as not only a "departure from our practice" but also "deeply misguided,"

> [g]iven the degree to which our evidentiary procedures already accommodate the government's compelling national security interests by admitting all of its evidence, including hearsay; given the heightened risk of error and unlawful detention introduced by requiring petitioners to prove the inaccuracy of heavily redacted government documents; and given the importance of preserving "the independent power" of the habeas court "to assess the actions of the Executive" and carefully weigh its evidence.

App. 79a (citation omitted).

Judge Tatel stated that "I fear that in practice" the presumption of regularity "'comes perilously close to suggesting that whatever the government says must be treated as true.'" App. 86a (quoting *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008)). He also found that the presumption was at odds with this Court's directives in *Boumediene* that the lower courts should make independent assessments of the Executive Branch's detention decisions. App. 74a-75a. The court's decision, as described by Judge Tatel, "denies Latif the 'meaningful

opportunity' to contest the lawfulness of his detention guaranteed by *Boumediene*." App. 69a.

Judge Tatel charged the court with "moving the goal posts" and then "call[ing] the game in the government's favor" by "engag[ing] in an essentially de novo review of the factual record, providing its own interpretations, its own narratives, [and] even its own arguments." App. 86a.

In the second part of his dissent, Judge Tatel provided a 26-page analysis of the district court's decision "apply[ing] the deferential clear error standard of review," with no presumption of regularity. App. 69a. He concluded that the district court "committed no clear error by finding that the Report was insufficiently reliable; that it committed no clear error by crediting Latif's account of what happened only insofar as it needed to; and that it adequately addressed the other record evidence." App. 87a. He therefore voted to affirm the grant of the writ of habeas corpus.

Judge Tatel's detailed consideration of the district court's assessment of the intelligence report focused on the uncertain and undisclosed circumstances of the interrogation [redacted] "translators of unknown ability and unknown experience," [redacted]

[redacted]

the existence of undisputed errors in the document [redacted] App. 90a. Judge Tatel concluded that the district court did not commit clear error in finding the [redacted] document to be insufficiently reliable to justify detention.

Judge Tatel also found that the district court had adequately addressed the credibility of Latif's account that he had been traveling in search of medical care. App. 93a-99a. In his view, the district court had "found Latif's account convincing enough, plausible enough, consistent enough, and corroborated enough to give it at least some weight against the government's evidence." App. 96a.

> It is in just this circumstance—where doubts about the government's evidence and confidence in the detainee's story combine with other evidence to fatally undermine the government's case—that a detainee may prevail even without the district court needing to credit the detainee's story by a full preponderance of the evidence. To require otherwise would, in effect, inappropriately shift the burden of proof to Latif.

App. 96a-97a.

Judge Tatel also concluded that there was no clear error in the district court's finding that "Latif's story [is] entitled to at least some weight." App. 97a. As for alleged "inconsistencies" in Latif's account, the district court properly regarded these as both minor and perhaps the product of translation or transcription errors, and appropriately concluded that the more significant fact was that the "fundamentals" of Latif's account had not changed. App. 98a.

Judge Tatel analyzed in detail various factual assertions in the court's opinion and found them insufficient to justify reversal. He was [redacted]

[redacted] Judge Tatel responded that, "[b]y that theory, Latif could be any [redacted] and maybe he goes [redacted] App. 105a. Judge Tatel concluded that there was [redacted]

Judge Tatel also criticized the court's assertion that the route traveled by Latif from Yemen to Afghanistan might be viewed as incriminating. App. 100a-102a. As he explained, there was no evidence that Latif's route did anything other than follow the main corridors of travel, and he likened the situation to the following "simple hypothetical":

> Suppose the government were to argue in a drug case that the defendant drove north from Miami along I-95, "a known drug route," Familiar with I-95, we would surely respond that many thousands of non-drug traffickers take that route as well. Given what we know about our own society, the I-95 inference would be too weak even to mention.

App. 100a. Since there was no evidence that Latif's route was "uniquely associated with al Qaeda recruits," it was not "clear error" for the district court to give no weight to the travel route allegation. App. 102a.

Judge Tatel also explained in detail that the district court had adequately considered all of the evidence, and that it had not taken an "unduly atomized" approach to the record. App. 106a-112a. He concluded:

> To determine, as this court apparently does, that an experienced district court judge has totally ignored relevant evidence and so committed legal error because his twenty-seven page opinion omits mention of a handful of tertiary items plucked from thousands of pages of record evidence not only ignores the presumption of district court lawfulness, but also imposes on that court a virtually impossible burden.

App. 110a-111a.

REASONS FOR GRANTING THE WRIT

1. This Court in *Boumediene* held both that a habeas petitioner is entitled to a "meaningful opportunity to demonstrate that he is being held" unlawfully, and that the "habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." 553 U.S. at 779, 783. Although *Boumediene* was decided in the context of the pending Guantanamo habeas petitions, its principles would likewise apply to any prisoners brought by future presidents to Guantanamo or to other detention facilities subject to the habeas remedy. The effect of the court of appeals' presumption of "regularity" and accuracy is to make it easier for the Executive Branch to detain people, not only when it is acting arbitrarily, but also when it is acting erroneously in good faith.

The presumption seriously erodes the protections of the habeas writ afforded by *Boumediene*.

In the Guantanamo habeas cases, detentions are generally sought to be justified on the basis of unsworn written interrogation summaries or other intelligence documents, not live testimony. All of these writings will now be subject to the court of appeals' "presumption of regularity" and accuracy for "intelligence reports." App. 20a. This presumption denies the Guantanamo petitioners a "meaningful opportunity" to challenge their detention, as Judge Tatel recognized, App. 69a, and will prevent district courts from "conduct[ing] a meaningful review of . . . the cause for detention," *Boumediene*, 553 U.S. at 783. The habeas court is required by *Boumediene* to "assess the sufficiency of the evidence against the detainee," *id.* at 786, which is impossible if the court simply presumes that the intelligence reports are accurate, as Judge Tatel also recognized, App. 74a-75a.

The fact that the presumption is "rebuttable" does not make it accord with *Boumediene*, but simply has the effect of placing a heavy burden of proof on the detainee. Moreover, the court strongly suggested that it might require the detainee to carry his burden with "clear and convincing evidence." App. 20a n.5. The court of appeals suggested that the presumption will have neutral effects, claiming that "[i]f a detainee introduces a government record to support his side of the story," based for example on "statements he made to his interrogators," then "he can benefit from the presumption as well." App. 19a. As the decision in this case demonstrates, any such benefit is illusory: to the extent that the detainee attempts to carry his burden

by relying on his own "self-serving" statement, he bears the further burden of proving that his account is "credible." App. 53a; *see also* App. 31a, 38a, 39a-41a.

It is a cruel joke to put any proof burdens on the Guantanamo detainees, who have been in custody for ten years, who have virtually no access to the outside world, much less access to evidence in the countries (*e.g.*, Pakistan and Afghanistan) where they were allegedly serving as members of an enemy force, who are denied access to classified information, including classified intelligence reports, and who have little access to any evidence other than their own words. The entire point of the habeas hearing is to force the government to justify its detention of people who have been neither charged nor convicted, not to allow it to skate by with presumptions.

As Judge Tatel aptly stated, the presumption "in practice" will come "perilously close to suggesting that whatever the government says must be treated as true." App. 86a (citation and internal quotation marks omitted). Such a result could not have been what this Court sought to accomplish in *Boumediene.*

The court of appeals defended the presumption by referring to the statement in the plurality opinion in *Hamdi v. Rumsfeld* that the "'Constitution would not be offended by a presumption in favor of the Government's evidence.'" App. 7a (quoting 542 U.S. 507, 534 (2004)). But as Judge Tatel pointed out, the *Hamdi* plurality was clear that a presumption was permissible only if the government puts forth "*credible* evidence" justifying detention, and it never sanctioned use of a

presumption that would deem the government's evidence to be accurate and reliable. App. 84a.

The court's reliance on the *Hamdi* plurality was also inappropriate because the concurring opinion of Justice Souter, which was necessary to the Court's judgment, specifically disagreed that "the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi." *Hamdi*, 542 U.S. at 553-54. The relevant precedent is this Court's decision in *Boumediene*. The Court in *Boumediene* pointed out that "the procedures suggested by the plurality in *Hamdi* . . . did not garner a majority of the Court." *Boumediene*, 553 U.S. at 784.

Boumediene also emphasized that the scope of review in a habeas case "in part depends upon the rigor of any earlier proceedings." *Id.* at 781. Where, as here, there has been no prior adjudication of guilt by a court, but only detention by "executive order[,] . . . the need for collateral review is most pressing." *Id.* at 783. The Court explained that a "criminal conviction in the usual course" is the product of a "disinterested" and "independen[t]" tribunal, which are not the "dynamics . . . inherent in executive detention orders." *Id.* Thus, "[i]n this context the need for habeas corpus is more urgent." *Id.* The Court added that "[t]he intended duration of the detention" also "bear[s] upon the precise scope of the inquiry." *Id.* Here, Latif has been in prison for more than ten years, and the government is apparently prepared to hold him, without ever charging him with doing anything, until he dies of old age. All of these factors demand that the district court thoroughly review the

evidence, as Judge Kennedy did in this case, and not simply award the case to the government through the use of presumptions.

There was also no factual foundation for according a presumption of regularity and accuracy to interrogation summaries. As is common in Guantanamo cases, the interrogations in Latif's case required translators so that an English-speaking interrogator could communicate with an Arabic-speaking prisoner. The translation problems involving Arabic-language detainees like Latif are particularly acute. As explained in detail in a declaration from a professor of Arabic at Georgetown University—a declaration ignored by the court of appeals—live interpretation between Arabic and English presents unusual difficulties even when the interpreter is fully fluent in both English and the correct Arabic dialect. App.165a-187a. In her expert and unrebutted opinion, "it cannot be presumed that Arabic interpretation in the interrogation of detainees, whether performed by a native speaker of Arabic or an American . . . , was fully accurate or reliable." App. 176a.

[redacted] The retired major general who organized the Guantanamo Bay intelligence operation after the September 11 attacks declared that "[t]he military linguists were

worthless" and were right "out of school." App. 190a. One linguist who worked there told a newspaper that "after taking a very intense crash course in Arabic" she "[didn't] fully understand" the language and that "it was not uncommon for her to mistake one word for another," such as the Arabic words for "communist" and "X-ray." App.128a; App. 199a-200a.

The reliability problems with [redacted] intelligence reports extend far beyond translation errors. [redacted] It is bootstrapping of the worst sort to deem an intelligence report to be an accurate reflection [redacted] simply because [redacted]

There were, moreover, specific examples in this record, ignored by the court of appeals, showing that intelligence reports cannot be assumed to be accurate. The record contains separate reports by an FBI agent and by a DOD employee of an

interrogation of Latif [redacted] App. 220a-224a. The reports, however, have numerous discrepancies. For example, one states that he is a Yemeni, App. 223a, while the other says both that he "claims Bangladeshi citizenship" and is a member of a Yemeni tribe, App. 221a. One says that he attended secondary school for "two or three years, and eventually graduated," App. 223a, while the other states that he claimed to have "never graduated from high school," App. 221a. It is obvious that at least one or perhaps both documents failed accurately to report what the translator was telling the interrogators.[4] In addition, the English-language transcript of Latif's hearing before the Combatant Status Review Tribunal puts words in his mouth that he never said, as verified by a review of the audio tape of the hearing by an expert translator. App. 228a-229a, 233a, 236a-237a, 239a-240a. If errors can occur in the context of quasi-judicial proceedings at Guantanamo, it is obvious that errors are almost certain to occur [redacted]

The intelligence reports at issue in this case and in other Guantanamo cases are created in circumstances which bear no resemblance to the types of documents, such as tax receipts, court dockets, and state court judgments, where a presumption of regularity may be appropriate. App. 70a-72a, 76a-77a, 85a-86a. The district courts in Guantanamo cases had "unanimously rejected" such a presumption for

[4] The government initially argued that the reports were so inconsistent that they proved that Latif, like a guilty man, was changing his story from one interrogation to another. When it was pointed out to the government that the reports were evidently from the same interrogation, and that the discrepancies were created by the government, not by Latif, the government abandoned this argument.

intelligence reports. App. 80a. Judge Kennedy had extensive experience with such reports and had found that they "are not necessarily accurate and, perhaps more importantly, that any inaccuracies are usually impossible to detect." App. 83a. As Judge Tatel observed, the "unanimous, hard-earned wisdom" of the district judges, and their "uniquely valuable perspective" and "fact-finding expertise," should not have been "[b]rush[ed] aside" by the court of appeals. App. 80a-81a.

The evidentiary presumption adopted by the court of appeals is significantly at odds with *Boumediene*'s command that the Guantanamo detainees have a "meaningful opportunity" in court to challenge the lawfulness of their detention and that the district courts conduct a "meaningful review" of the legality of their detention. 553 U.S. at 779, 783. The presumption may also have consequences beyond the habeas cases of the Guantanamo detainees, because it may be used by the Executive Branch in the future as a basis to detain individuals, including citizens, indefinitely and without charge, either at Guantanamo or at some new prison, solely on the basis of anonymous interrogation summaries. The presumption may also have unforeseen consequences in other types of federal court litigation. The court should grant certiorari.

2. The court of appeals' unwillingness to give appropriate deference to the factual findings and analysis of the district court also served to deny Latif a meaningful habeas hearing.

The court did not find any of Judge Kennedy's factual findings to be clearly erroneous. Instead, it effectively ignored them in favor of its own factual analysis,

as is obvious from a review of Judge Brown's 53-page opinion. As Judge Tatel observed, the court "engaged in an essentially de novo review of the factual record, providing its own interpretations, its own narratives, even its own arguments." App. 86a.[5] Judge Tatel noted that the court even purported to "[e]xhibit heretofore unknown expertise in al Qaida recruitment strategies." App. 99a.

Judge Henderson essentially admitted in her concurrence that the court was doing its own fact review, stating that the presence of "conflicting evidence" in the record "requires us, as the reviewing court, to assess the comparative weight of the evidence both for and against the district court's finding." App. 56a.

A court of appeals is not permitted to "duplicate the role of the lower court." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Rather, its job is to review the trial court's fact findings for clear error, and it can reverse the trial court on a factual issue only when it has a "definite and firm conviction that a mistake has been committed." *Id.* The failure to give appropriate deference to the district court's

[5] For instance, undisputed errors and "inconsistencies" in the report found to be significant by the district court were dismissed by the court of appeals as "minor" and only "tangential 'clerical errors.'" App. 25a, 27a, 139a. Similarly, the district court placed significance on the fact there was "no corroborating evidence for any of the incriminating statements" in the report, including no statements from any other detainee implicating Latif. App. 139a. The court of appeals apparently regarded these facts as essentially insignificant when it weighed the evidence. App. 35a & n.11. Incredibly, however, it regarded the reliability of the report to be bolstered by accounts of subsequent interrogations of Latif, even though the information in those later reports—*e.g.*, that Latif studied the Koran in Afghanistan, that Abdul Fadel was imam of a mosque in Kabul, that Taqi Ullah guided Latif over the border—was entirely exculpatory and inconsistent with the government's allegations. App. 29a-30a, 39a-41a. As Judge Tatel noted, the majority "nowhere disagree[d] that all of the names and statements appearing in the Report sound similar to names and statements Latif later made." App. 92a-93a.

findings means that the habeas hearing in the district court is not a "meaningful opportunity" for review of the lawfulness of the detention.

That the court of appeals remanded the case, ostensibly so that "the district court can evaluate Latif's credibility as needed in light of the totality of the evidence," App. 2a, does not compensate for the majority opinion's disregard of the district court's already thorough evaluation of the record.[6] The remand to a new judge, now that Judge Kennedy has retired, will chiefly result in substantial delay in the resolution of Latif's petition for the writ, which two judges already voted to grant. Indeed, a majority of the court of appeals openly questioned the utility of the remand: Judge Henderson wrote that any "remand for further factfinding will be a pointless exercise," and Judge Tatel observed that she "may well be" correct. App. 54a, 86a.

3. The court of appeals through its actions in this and other cases has created a regime in which Guantanamo habeas cases are becoming exercises in futility. The court has decided sixteen detainee cases on the merits. The court has not affirmed a single habeas grant, and it has remanded any denial that it did not affirm. In six of the cases, the detainee prevailed in the district court, but the court of appeals

[6] Claiming to respect "the district court's expertise as a fact finder and judge of credibility," Judge Brown nonetheless instructed that on remand "the district court must consider the evidence as a whole, bearing in mind that even details insufficiently probative by themselves may tip the balance of probability, that false exculpatory statements may be evidence of guilt, and that in the absence of other clear evidence a detainee's self-serving account must be credible—not just plausible—to overcome presumptively reliable government evidence." App. 53a.

erased all six wins. It reversed three outright,[7] and remanded the other three.[8] By contrast, the court affirmed eight of the ten government wins.[9] It remanded the other two.[10]

Judge Brown, the author of the majority opinion here, did not hide her hostility to *Boumediene*. Her decision refers to "*Boumediene*'s airy suppositions" as "caus[ing] great difficulty for the Executive and the courts." App. 52a. The decision further accuses this Court of "fundamentally alter[ing] the calculus of war, guaranteeing that the benefit of intelligence that might be gained—even from high-value detainees—is outweighed by the systemic cost of defending detention decisions." *Id.* The decision then as much as says that *Boumediene* is forcing the Executive Branch to wage war on a give-no-quarter basis: "*Boumediene*'s logic is compelling: take no prisoners. Point taken." App. 53a. Judge Tatel's dissent correctly observes that the decision constitutes an "assault on *Boumediene*," and that the court, "[n]ot content with moving the goal posts," has "call[ed] the game in the government's favor." App. 86a. He adds that given the court's approach here, it

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[7] *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010); *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011), cert. pet. pending; *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011), cert. pet. pending.

[8] *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011); *Latif v. Obama*, --- F.3d ---, No. 10-5319 (D.C. Cir. Oct. 14, 2011) (classified opinion).

[9] *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010); *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010); *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011); *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011), cert. pet. pending; *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011); *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011).

[10] *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010); *Warafi v. Obama*, 409. F. App'x 360 (D.C. Cir. 2011).

is "hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'" *Id.*

Other judges on the court have likewise been openly critical of *Boumediene*. Judge Silberman has called *Boumediene* a "defiant . . . assertion of judicial supremacy."[11] *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (concurring opinion). Judge Silberman stated:

> I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter. Unless, of course, the Supreme Court were to adopt the preponderance of the evidence standard (which it is unlikely to do—taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene v. Bush*). But I, like my colleagues, certainly would release a petitioner against whom the government could not muster even "some evidence."

Id. (citation omitted).

The *New York Times*, in a lead editorial about this case, observed that *Boumediene* "has been eviscerated by the Court of Appeals for the District of Columbia Circuit," and urged this Court to "reject this willful disregard of its decision . . . by reviewing the case of Adnan Farhan Abd Al Latif." Editorial, *Reneging on Justice at Guantanamo*, N.Y. Times, Nov. 20, 2011, at SR10, http://www.nytimes.com/2011/11/20/opinion/sunday/reneging-on-justice-at-guantanamo.html. Jonathan Hafetz, an associate professor at Seton Hall Law School, has described this case as "the culmination of a series of D.C. Circuit

[11] In a talk at the Heritage Foundation last year, Senior Circuit Judge Randolph compared the Justices in *Boumediene* to the characters in *The Great Gatsby*, "careless people, who smashed things up . . . and let other people clean up the mess they made." *See* "The Guantanamo Mess," www.heritage.org/Events/2010/10/guantanamo-mess.

decisions that have effectively gutted *Boumediene* by construing habeas in the narrowest of terms, reversing district judges who've sought to scrutinize the government's evidence, and denying judges any power to remedy unlawful detention," thereby fostering "a result-oriented jurisprudence in which the circuit's main purpose is to affirm habeas denials and reverse grants." Jonathan Hafetz, *The D.C. Circuit and Guantanamo: The Defiance Reaches New Heights*, Balkinization, Nov. 16, 2011, http://balkin.blogspot.com/2011/11/dc-circuit-and-guantanamo-defiance.html.[12]

The need for supervisory intervention by this Court in the Guantanamo cases is obvious and urgent.

4. The [redacted] pages in the [redacted] document are classified as "secret," and, as a result, portions of the court of appeals' decision are redacted. This, however, should not pose an impediment to this Court's hearing and resolving this case on the public record.

First, the issues raised by this petition are legal in nature and are of general applicability. The "presumption of regularity," for instance, can be argued and resolved without reference to any classified information. This Court has previously

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[12] *See also* Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 42 Seton Hall L. Rev. 1451 (2011) (discussing the "fundamental unwillingness by the D.C. Circuit" to provide the detainees with the "meaningful" habeas opportunity promised by *Boumediene*); David Cole, *Guantanamo: Ten Years and Counting*, The Nation (January 4, 2012), http://www.thenation.com/article/165443/guantanamo-ten-years-and-counting (observing that the D.C. Circuit, "echoing the South's resistance to the 1954 *Brown v. Board of Education* ruling," has "rendered virtually meaningless the judicial review" granted by *Boumediene*).

handled cases involving classified evidence (*e.g.*, the Pentagon Papers case) and has done so on the public record without revealing classified information.[13] *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

Second, it appears doubtful that the relevant facts stated in the [redacted] document actually require or merit classified treatment. The document itself is more than ten years old. It has [redacted] of visible text, none of which relates to current events. The most relevant parts of the document deal with Latif's personal circumstances, not with security issues. Given the large public interest in having open proceedings in this Court, we believe that the Solicitor General, if requested by this Court to give the views of the United States, would agree that all, or at least most, of the document's visible text should be declassified.

CONCLUSION

The court of appeals has essentially held that a man who has been detained by the government for ten years can be detained for what remains of his life solely on the basis of a few sentences in a single secret intelligence document [redacted] This result unreasonably expands the power of the Executive Branch to imprison people without ever charging them or giving them a trial. Such an outcome cannot be squared with this Court's decision in *Boumediene*.

[13] If there is any classified information that either party wants to bring to the Court's attention, they can do so in a classified supplement to the party's brief. This need not have any effect on the public briefing, argument, and decision in the case.

Respectfully, the Court should grant the petition for certiorari, should overturn the "presumption of regularity" applied by the court of appeals to intelligence reports, and should restore the court of appeals to a proper appellate role in the Guantanamo habeas cases.

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January 12, 2012

IN THE SUPREME COURT OF THE UNITED STATES

No. __-__

ADNAN FARHAN ABDUL LATIF,

Petitioner,

v.

BARACK OBAMA, ET AL.,

Respondents.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ Certiorari to the United States Court of Appeals for the District of Columbia Circuit contains 7,543 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2012.

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CERTIFICATE OF SERVICE

I, S. William Livingston, a member of the Bar of this Court, hereby certify that on January, 12, 2012, true and correct copies of the foregoing classified petition, and the accompanying appendix, were served, via the Court Security Officer, on the Solicitor General of the United States, at the following address:

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